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June 22, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

HAND DELIVER

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Omnipoint Corporation
Ex Parte Presentation; PP Docket No. 93-253

Dear Mr. Caton:

In conformity with section 1.1206(a) of the Commission's Rules, enclosed please find two copies of an ex parte presentation to be submitted for inclusion in the above-referenced docket.

Should you have any questions concerning this matter, please contact the undersigned directly.

Sincerely,



Mark J. O'Connor
Counsel for Omnipoint Corporation

/mjo
Enclosures

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HAND DELIVER

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614-B
Washington, D.C. 20554

Re: Revision of the PCS Block C Auction Rules
PP Docket No. 93-253: Ex Parte Presentation

Dear Mr. Kennard:

Omnipoint Corporation hereby replies to the letters recently submitted to the Commission concerning the Block C auction rules. As discussed in detail below, Omnipoint generally agrees that, if changes are to be made, it will better serve all entrepreneurs to raise the preferences available to small businesses to levels previously offered only to minority and women-owned applicants, with the exception of an extension of the "49% option" to all small businesses. It also agrees that the public interest would be better served with a full notice, comment, and reply comment procedure to address these very complicated issues facing the Commission.

First, Omnipoint opposes the simple extension of the option allowing large companies to own 49% of an applicant, 47 C.F.R. § 24.709(b)(4), to all small business entrepreneurs, as suggested in some recent ex parte letters to the Commission.¹ While

¹ Letter from Roy M. Huhndorf, President, Cook Inlet Region, Inc., to The Honorable Reed E. Hundt, P.P. Dkt., No. 93-253, at 2 (filed June 14, 1995); Letter from Sherrie Marshall of the Marshall Company to The Honorable Reed E. Hundt, P.P. Dkt., No. 93-253, at 1 (filed June 15,

(Footnote continued to next page)

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such a change may seem at first glance to be similar to extending the 25% discounts and better interest terms to all applicants, Omnipoint believes that, in fact, it will radically disturb the negotiating rules that prospective entrepreneur entities have worked under for the past year, and disempower all entrepreneurs.

The so-called "49% option" was first developed in the Fifth Report and Order because the record demonstrated that "women and minorities have especially acute problems in obtaining financing." Fifth Report and Order, 9 FCC Rcd. 5532, 5602 (1994). The record did not support the extension of those same benefits to *all* small business entrepreneurs. Since the rule was adopted, the only significant event has been the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 1995 WL 347345 (dec. June 12, 1995), which cast doubt on the Commission's rules benefiting minorities. The record does not suggest now, any more than it did at the time the Fifth Report and Order was released, that the "49% option" must be extended to *all* small business applicants.

Further, as a practical matter, the fact that every entrepreneur *could* offer the "49% option" to large companies means that the large companies will require that, as a *minimum* condition to enter the negotiation process, applicants offer them 49% equity, plus additional rights (such as operating control, brand name, puts, royalties, etc.). In contrast, the existing "25% maximum option" has allowed applicants to maintain substantial control over their own companies by balancing the interests of three 25% non-entrepreneur owners, without the imposition of a dominant 49% owner. This result was intended by the rules: "the 25% limitation on equity investment interest will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps." Fifth Report and Order, 9 FCC Rcd. 5532, 5601-02 (1994). That safeguard will be lost if *all* small business applicants have a 49% equity exception to the attribution rules. The negotiating leverage will shift entirely in favor of the large entities.

Applying a 49% option to *all* small business applicants would deliver to big investors the ultimate negotiating tool with entrepreneurs. Regardless of the

(Footnote continued from previous page)

1995); Letter from Shelley L. Spencer of AirLink to Reed E. Hundt, P.P. Dkt., No. 93-253, at 1 (filed June 16, 1995).

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Commission's rules against "fronts," the big investor contributing the preponderance of the capital for the applicant will want to control as much of the company operations as is legally possible, through complex management agreements, put rights, royalty arrangements, investor veto rights, and de facto constraints on sales after the lapse of the five year anti-trafficking restriction. Undoubtedly, some will actually force conditions on applicants that step well into the gray areas regarding the limit of control, as defined by the FCC. While we appreciate that the FCC will review issues of control on a case-by-case basis after the auctions, rules that fortify entrepreneur control from the outset would benefit the objective of ensuring a diversity of licensees, and participation for minorities, women and small businesses. In contrast, a 49% option for all small businesses would only benefit the big investors, as applicants would be forced to meet the market's lowest common denominator, compromise on control issues, and flirt with the very limit of the law in order to attract available investors.

Minority or women-owned entities that have already structured their plans based on the "49% option" would not be materially harmed if required to comply only with a "25% option," while leaving all other arrangements intact. A change from 49% to 25% for the large investor does not affect the non-equity provisions of existing agreements with them, such as brand-name agreements, put rights, roaming arrangements, etc. In fact, if the 49% option is extended to all small businesses, large investors are more apt to break their deals with minority and women applicants to search even more favorable terms among a larger pool of potential applicants.

With the "25% maximum option," any large entities that wanted management rights could still negotiate with any entrepreneur either before or after the auction. The key difference is that the entrepreneur will likely have two other large investors, each with 25% equity, that will have to be convinced that the terms are fair and in accordance with the Commission's rules.

Second, Omnipoint wishes to emphasize that these are highly complicated issues; cutting corners on the rulemaking process, for example, shortening the public comment period or eliminating reply comments, will redound to no one's benefit. As National Telecom pointed out, the designated entity community can survive one, but perhaps only one, more rulemaking process to resolve these issues. Omnipoint generally concurs with Central Alabama Partnership and Mobile Tri-States ("Central Alabama") that an expedited but not an "emergency" rulemaking is the right path. The potential ten days

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that might be saved are not worth the risk of a court declaring that there was no emergency.

Third, Omnipoint disagrees with the suggestion of Central Alabama that the comments should be limited to only specific proposals and to ten pages. The entrepreneur's rules are staggeringly complex already, to propose significant changes will only raise even more questions and ambiguities. Most applicants have only focused on the rules that applied to their status; if suddenly they are subject to rules that previously never applied to them they will need time to react and a reasonable number of pages to respond. If a page limit is instituted, 25 pages for comments would be reasonable.

In accordance with the Section 1.1206(a)(1) of the Commission's rules, two copies of this letter have been submitted this day to the Secretary's Office for inclusion in the above-referenced docket.

Sincerely,



Mark J. Tauber
Mark J. O'Connor
Counsel for Omnipoint Corporation

cc: Honorable Reed Hundt
Honorable James Quello
Honorable Andrew Barrett
Honorable Rachelle Chong
Honorable Susan Ness
Regina Keeney
Dr. Robert Pepper
Kathleen Ham
Donald Gips
Catherine Sandoval
Jonathan Cohen, Esq.
Peter Tenhula, Esq.